

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE

**SUNSET CULTURAL CENTER**

**and**

**Case 32–CA–242555**

**ANDREW HURCHALLA**  
**An Individual**

*Leila M. Gomez, Esq.*, for the General Counsel.

*Rona P. Layton, Esq. (Layton Law Firm)*,  
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case in Oakland, California, on December 10–11, 2019. This case was tried following the issuance of a complaint and notice of hearing (complaint) by the Regional Director for Region 32 of the National Labor Relations Board on September 3, 2019. The complaint was based on an unfair labor practice charge filed by Charging Party Anthony Hurchalla (Charging Party or Hurchalla) on June 3, 2019, against Respondent Sunset Cultural Center (Respondent or SCC). The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act), by prohibiting its subcontractors and/or customers from employing Hurchalla to perform work at its theater facility and/or causing them to remove him from working on events at that facility, in each case based on his concerted, protected activities and conduct as a steward of International Alliance of Theatrical Stage Employees Local 611 (the Union or Local 611). Respondent, by its answer to the complaint, denies committing the alleged unfair labor practices as alleged.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and

to file post-hearing briefs.<sup>1</sup> The General Counsel and Respondent filed post-hearing briefs, which have been carefully considered. Accordingly, based upon the entire record herein,<sup>2</sup> including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

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## FINDINGS OF FACT

### I. JURISDICTION

10 Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

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### II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent, a California non-profit corporation with a place of business in Carmel, California, operates a performing arts center which presents live music, concerts, and other performing arts events to the public. Certain of the stage crew members who work at SCC are represented by I.A.T.S.E. Local 611 of the International Alliance of Theatrical Stage Employees and Motion Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL–CIO, CLC (Local 611 or the Union). The Union represents skilled theatrical employees, including stagehands, audio and lighting technicians, equipment operators, carpenters and riggers; it operates a hiring hall whereby it supplies labor based on the requests of employers, such as SCC. (Tr. 28.)

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Included in every crew the Union dispatches to work a production at Respondent’s theater is an individual designated as its onsite job steward. Responsibilities of the onsite job steward (in addition to performing stage labor) include documenting the hours worked on the production. Charging Party Hurchalla, a member of Local 611, often served as the onsite job steward for work calls at SCC. (Tr. 36–38.) The General Counsel contends that it was his zeal in policing the CBA covering the workers that motivated Respondent to ban him from dispatch to the theater. Respondent denies all allegations and asserts that its actions towards Hurchalla were based on a complaint from one of its production companies, as well as a concern that he posed a liability as a workplace bully and harasser. Respondent further asserts that the complaint allegations are barred by Section 10(b) of the Act.

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<sup>1</sup> Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh. \_\_\_” for General Counsel’s Exhibit; “R. Exh. \_\_\_” for Respondent’s Exhibit; and “R. Br. at \_\_\_” for Respondent’s post-hearing brief.

<sup>2</sup> I note and correct the following inaccuracies in the transcript: the phrase, “Let’s shoot it up,” appearing at p. 17, ll.14–15, is corrected to read, “We’re suited up”; and the term, “Weinman [sic]” appearing at p. 120, l.10, is corrected to read, “*Weingarten*.”

*A. Factual Background*<sup>3</sup>

1. Respondent's operations and relationship with Local 611

5 SCC is an entertainment venue for various touring productions; its business model involves contracting with a given production and thereby becoming obligated to meet that show's technical requirements. Respondent leases its theater premises from the City of Carmel, California. Respondent's governing body is a 13-person board of directors (the Board). Respondent's executive director is Christin Sandin (Sandin), and its operations manager is  
10 Roland Weaver (Weaver). Reporting to Sandin and Weaver is the SCC Production Manager, who supervises the crew and "advances" shows with their touring companies (i.e., arranges for the show's technical specifications). The production manager is also responsible for obtaining stage crew labor for productions. During the time period relevant to this case, Respondent employed two production managers: Michael Jayco (February 2014–May 2018), and Gary  
15 Brunclik (May 2018 forward). (Jt. Exh. 1; Tr. 30, 263, 375.)

Between 2007 and 2017, Respondent had a collective-bargaining relationship with the Union and obtained its stage crew through the Local 611 hiring hall. This involved the production manager contacting the Union's dispatcher with a specific call for labor, which could include a  
20 request for a specific worker, although the Union ultimately retained discretion as to which individual workers were dispatched. At all relevant times, Respondent's main liaison with Local 611 was Patrick Fitzsimmons (Fitzsimmons), who goes by the title business representative or business agent. (Tr. 28, 264.)

25 Following the expiration of their most recent collective-bargaining agreement in 2013, the parties unsuccessfully attempted to negotiate a successor agreement.<sup>4</sup> In August of the following year, the Union rejected Respondent's last, best and final offer, at which point Respondent implemented the terms of that offer. The parties abided by the terms of Respondent's offer  
30 (including the hiring hall provisions) until September 2017; at that point, however, Respondent began subcontracting its stage labor. Because at least two of the subcontractors Respondent used were themselves signatory to an agreement with Local 611, a portion of the workers supplied to Respondent continued to be obtained through the Union's hiring hall. (Tr. 30–34; GC Exhs. 2, 3; Jt. Exh. 8.)

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<sup>3</sup> Certain of my findings are based on witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed. Appx. 516 (D.C. Cir. 2003). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262, 1262 n.2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *rev'd on other grounds* 340 U.S. 474 (1951)). Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis.

<sup>4</sup> The Board delegated the task of negotiating with Local 611 to a 3-person, ad hoc committee known as the "negotiating committee." (Tr. 374–375.)

## 2. Hurchalla's work at SCC and activity on behalf of Local 611

The Union first dispatched Hurchalla to SCC in September 2012. He was assigned a wide variety of roles, including audio, lighting, rigging, carpentry, and equipment operator work. In the 6 years during which he was dispatched to SCC, Hurchalla worked between 60 and 70 events, which varied in length anywhere from one day to over a month per event. According to Fitzsimmons, Hurchalla was dispatched to work the majority of SCC productions due to his wide range of job skills. (Tr. 38, 61, 98–99, 266–267.)

In 2014, Hurchalla was selected to become an onsite job steward for the Union; according to Fitzsimmons, this was due to Hurchalla's "varied skillset," as well as his knowledge of the parties' collective-bargaining agreement and willingness to engage in "difficult conversations" with management if it appeared that the contract was being violated. Hurchalla was considered the "main job steward" for Sunset Center productions, in that he served as job steward for the majority of productions held there.<sup>5</sup> As steward, Hurchalla was responsible for policing the parties' contract, interacting with management on the crew's behalf and addressing issues that arose between the crew and management. Another of Hurchalla's steward functions was to prepare a "steward report" for each work call; this consists of a report of which employees worked various positions and the hours that they worked. During his tenure as steward, Hurchalla filed approximately 4–5 grievances, both on behalf of himself and other crew members. (Tr. 39–41, 50–51, 99–100, 102, 103, 267.)

In addition to his steward role, Hurchalla held other positions with Local 611. In October 2015, he was elected as its financial secretary and its health and welfare officer, which placed him on the Local's executive board and for which he was paid a stipend. He was also assigned as an acting business agent when Fitzsimmons was not available; for this work, he was paid the equivalent of Fitzsimmons' salary.<sup>6</sup> In early 2017, Hurchalla attended 4–5 negotiation sessions on behalf of the Union on the subject of SCC's planned transition to a subcontracting model. (Tr. 102, 211–212, 244, 247.)

## 3. Hurchalla's conflicts with production manager Michael Jayko

Between 2014 and 2018, Hurchalla was directly supervised by SCC's then-production manager, Michael Jayko (Jayko). Their relationship was fraught, mainly because Hurchalla frequently accused Jayko of violating the terms of the parties' collective-bargaining agreement. According to Jayko, Hurchalla's zeal to enforce the contract amounted to opportunism; in his words, Hurchalla was "consistently confrontational" and "if there was an opportunity to create discord, he initiated discord with me." (Tr. 100, 315, 317.)

Hurchalla was also a frequent and open critic of Jayko's own job performance. The record is replete with instances of him taking issue with Jayko's ability to successfully "advance"

<sup>5</sup> I do not agree, as asserted by the General Counsel, that Hurchalla was actually appointed to serve as "chief job steward for all upcoming performances and productions held at Respondent's facility." (GC Br. at 5.)

<sup>6</sup> When acting in this capacity, Hurchalla appears to have identified himself as "assistant business representative." See, e.g., GC Exh. 21.

productions.<sup>7</sup> No longer employed by Respondent at the time of the hearing, Jayko was visibly aggravated in recounting what he considered Hurchalla's interference with his efforts to manage productions effectively.<sup>8</sup> Jayko's frustration over dealing with the Union was unvarnished, and he described the relationship between crew and management as involving "resentment and anger" and "a lot of history." Nor did Jayko make any attempt to conceal his disdain for Hurchalla's role as a steward, in his words, their "hostile" relationship was due the fact that the Union had an "agenda." (Tr. 291–292, 315–317.)

Jayko also testified that Hurchalla made him "uncomfortable," although he never identified what specific aspect of Hurchalla's conduct or demeanor caused him to feel so. At hearing, this claimed discomfort appeared somewhat embellished and histrionic; he claimed to have been distressed "[t]he whole time that I was at Sunset Center working with Mr. Hurchalla. From the first day that he came on stage." Asked to identify specific incidents that made him feel particularly uncomfortable, he recounted the first time he interacted with Hurchalla as a steward in an overtime dispute. While they clashed frequently, the two men never engaged in any physical altercation, threats, slurs, obscene language, or name calling during these interactions. While Jayko claimed that Hurchalla "got in his face" on several occasions, he also admitted that the two men never went "nose to nose." (Tr. 213–214, 309–310, 313–314, 317.)

#### 4. The do-not-dispatch orders issued against Hurchalla

The General Counsel alleges that, since December 2018, Respondent has unlawfully caused its subcontractors and customers to cease using Hurchalla as stagehand labor at SCC and additionally caused them to remove him physically from the theater. As discussed below, the record evidence reveals that the Hurchalla's "ban" from SCC actually amounted to three separate determinations by Respondent. First, in 2016, Respondent decided to bar Hurchalla (and another stagehand) from working on productions by a specific client, The Panetta Institute. Second, in March 2018, Respondent extended this ban by requesting that one of its subcontractors not dispatch Hurchalla from working at SCC for non-Panetta Institute events. Finally, in March 2019, Respondent caused another subcontractor to eject Hurchalla from the theater after he had been dispatched there to perform work.

##### *a. April 2016: The First Panetta do-not-dispatch order*

The Panetta Institute for Public Policy<sup>9</sup> puts on lectures at SCC. Hurchalla, who had been assigned to work this event in the past, testified that, historically, the production itself was preceded by an 8-hour shift called a "pre-hang day," during which the crew performs electrical work and well as presets furniture and signage. (Tr. 116, 120–121.)

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<sup>7</sup> As indicated, this is the pre-show process whereby the production manager arranges details, such as staffing, breaktimes and crew meals pursuant to production's "rider" (i.e., the document that the production sends in prior to the event date contained their requirements for the production), to ensure that the production goes smoothly. (Tr. 49–50, 117–118, 137, 213.)

<sup>8</sup> While his account was somewhat rambling, it appears that Hurchalla prevented him from dealing directly with crew to create a "core group" (i.e., a consistent crew) of Local 611-dispatched technicians at SCC.

<sup>9</sup> This organization was founded and is run by former Secretary of Defense Leon E. Panetta and his wife, Sylvia Panetta.

## (i) The April 2016 Panetta Institute event

On April 18, 2016, a Panetta Institute event was held at SCC; Jayko oversaw the production and Hurchalla was dispatched to work the event and also served as Local 611's steward. Contrary to past practice, no "pre-hang day" was scheduled for the production. It is undisputed that the production itself suffered from significant delays. According to Hurchalla, the failure to schedule a pre-hang day ultimately set back the production by approximately four hours. (Tr. 116, 120–121, 130.) Jayko, as detailed below, blamed the slowdown on Hurchalla and a fellow crew member.

Hurchalla and Jayko had several "run-ins" during the course of the production: Hurchalla accused Jayko of performing bargaining unit work, and Jayko accused Hurchalla of "dragging [his] feet" and causing the production to fall behind. The two also clashed over Jayko's adherence to the collective-bargaining agreement's requirements. Specifically, Hurchalla refused to allow the crew's head electrician—Sylvie VrayEnt (VrayEnt) to go on a 1-hour meal break while a non-electrician crew member filled her position. (Tr. 125–126.)

## (ii) Sylvia Panetta requests that Hurchalla and VrayEnt not work on Panetta Institute events

April 18, 2016 was to be the last day that Hurchalla was dispatched to a Panetta Institute event at SCC. A few weeks after the event, Jayko and SCC Executive Director Sandin met with Sylvia Panetta (Panetta), who demanded to know what had caused delays in the production. Jayko laid the blame on Hurchalla's refusal to allow a non-electrician to substitute for VrayEnt during her break, stating that there had been "issues with people crossing departments." At that point, Panetta stated, "we don't want to see those two individuals back on the campus for the remainder of our series." (Tr. 130–131, 281–282, 367–371.)

On May 4, 2016, Jayko emailed the Union's dispatch mailbox about an upcoming event to be put on by The Panetta Institute. The email states, in part, that "Sunset Center requests that Sylvie VrayEnt and Andrew Hurchalla not be dispatched for this or any future Panetta Lecture Series Events." As a result, the Union did not dispatch Hurchalla for two productions that took place during the next week (on May 7 and 9). Other than VrayEnt and Hurchalla, no other SCC stage crew has ever been placed on do-not-dispatch status. (GC Exh. 4; Tr. 42–44, 353–354.)

*b. December 2016: Hurchalla raises overtime concerns for SCC workers and management decides SCC has "tolerated his behavior long enough"*

## (i) The overtime complaint

On December 6, 2016, Hurchalla complained to Jayko that two members of the stage crew—Craig Lowe (Lowe) and Melissa DeGiere (DiGeire)—had gone into weekly overtime during recent productions and requested that Jayko address the issue. Jayko was not receptive; he accused Hurchalla of being inflexible for insisting that SCC follow California state overtime law, which he argued had been "waived." On December 10, Hurchalla followed up with an email; Jayko did not respond but Hurchalla received a response the following day from SCC's Operations Director Weaver, who promised to look into the issue. (Tr. 104; GC Exhs. 24, 25.)

On December 14, Hurchalla emailed Weaver (copying Jayco and Fitzsimmons) asking for an update on the overtime issue. Later that day, Weaver responded to Hurchalla's email, stating that, because the parties were operating under the terms of an expired collective-bargaining agreement, California overtime law did not apply.<sup>10</sup> The debate continued the following day, when Hurchalla sent a response email, stating that the California overtime exemption did not apply to expired collective-bargaining agreements, such as the one under which the parties were operating. He then laid out the case for the overtime he claimed had not been paid, accusing SCC of manipulating employee schedules to avoid its overtime obligations. (GC Exhs. 26, 27.)

Two days later, on December 17, Weaver emailed Fitzsimmons with a copy to Sandin, Jayko and Hurchalla, complaining that Hurchalla was pressing an overtime claim on behalf of two employees and that,

[i]n doing so, he is presenting certain assertions, opinions, and interpretations of procedures, practices, and contract status as related to State law, that to SCC appears to represent the position and business interests of the Local 611 collectively. As such, further communication should be presented by a Business Manager.

(GC Exh. 28.)

(ii) Weaver floats the idea of disciplining Hurchalla and Sandin directs managers to document his conduct

About a half-hour after he responded to Fitzsimmons, Weaver sent another email. This time, he wrote internally to Sandin, with a copy to Jayko. He surmised that the Union had been dispatching Hurchalla for crew calls at SCC "in part, to create disruptions and engage in disagreements with management, often with hostile behavior." Hurchalla's claims, Weaver noted, usually had no merit, but the sheer frequency with which he raised them was itself creating a problem, as was his "harshly unprofessional and insubordinate" manner of raising them, which involved disparaging and trying to provoke Jayko. As Weaver put it, "the first problem is dealing with [Hurchalla] himself."

He then stated:

We have tolerated his behavior long enough, too long really, and we consider him as having one foot out the door. Care will be taken to ensure that he is not dismissed or terminated for

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<sup>10</sup> California's overtime law, Labor Code section 510, provides that it does not apply "to the payment of overtime compensation to an employee working pursuant to . . . [a]n alternative workweek schedule adopted pursuant to a collective bargaining agreement pursuant to Section 514." Section 514 exempts an employer from California's overtime laws if a CBA "expressly provides for the wages, hours of work and working conditions of the employees and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage."

disagreeing with management. I think that would put us in a legal mess.

(Jt. Exh. 18.)

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Weaver then posited a scenario in which Hurchalla might engage in a “disagreement” or “confrontation” when *not* acting as a steward; in this case, he suggested, Jayko would send Hurchalla home with pay in order to consider further disciplinary action. Weaver then identified a second problem SCC was facing: Hurchalla’s overtime claim and specifically his contention that the parties’ expired contract did not operate to exempt SCC from its overtime obligations under California law. Notably, he acknowledged the possibility that Hurchalla’s argument actually had merit, stating, “I think his assertion that the CBA is not valid is a big deal . . .” and “there may be an element of truth to that, but I can’t be certain.” *Id.*

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Four days later, on December 21, Sandin responded to Weaver’s email. Copying Jayko and McCloud, she urged both Jayko and Weaver to document any problems with Hurchalla and address them with him “immediately.” Referring them to the SCC handbook, she reiterated, “[t]he critical point is to address any issues immediately, with appropriate action and documentation, without letting time pass.” *Id.* Jayko appears to have taken the directive to document Hurchalla’s conduct to heart. On February 22, 2017, he emailed the Union’s dispatch mailbox requesting a crew for another Panetta Institute event, adding, “[p]lease do not dispatch Andrew Hurchalla or Sylvia VrayEnt as per clients request.” (GC Exh. 5.)

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*c. March/April 2017: Jayko clashes with Hurchalla and receives a verbal warning*

Hurchalla’s enthusiastic policing of the parties’ contract led to further confrontations with Jayko in early Spring 2017. In early March, he accused Jayko of performing bargaining unit work and then filed a grievance over the incident,<sup>11</sup> which Weaver agreed had merit. A month later, on April 4, the two fell out again after Jayko tried to place Hurchalla on a 6-1/2 hour break during his shift; Hurchalla accused Jayko of violating the parties’ expired contract, which provides that a job steward is required to be present “at all times work is being performed, exclusive of his/her meal breaks,” which may last no longer than one hour. He then accused Jayko of causing the scheduling problem by inadequately advancing the production and added that he could teach him “something about properly advancing shows and production management.” (Tr. 134, 136–138, 216–217, 331–332; Jt. Exh. 7 at 3, 6; GC Exh. 47 at 2.)

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The two parted ways, leaving the break issue unresolved. Twenty minutes later, Jayko engaged Hurchalla again, insisting that he take the extended break and appoint an acting job steward in his absence. Hurchalla refused, insisting that this was not contractually permitted and physically showed Jayko the operative portions of the collective-bargaining agreement. Hurchalla denied raising his voice, yelling, threatening, berating, or harassing Jayko during these exchanges, and described both men’s demeanor as “calm.” (Tr. 139, 141–144.)

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Another 20 to 30 minutes later, Jayko capitulated, offering that Hurchalla could break for an hour, during which time another technician could stand in as steward. Hurchalla agreed. With the issue resolved, Jayko walked away about 20 feet, but then turned around and asked Hurchalla

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<sup>11</sup> I credit Hurchalla’s version of this incident, which went unrebutted by Jayko.

what he had meant about telling him the he could “teach him something about production management.” Hurchalla responded with an outright critique of Jayko’s management abilities, accusing him of lacking a grasp of his job and asserting that his break scheduling was causing production problems that were in turn costing SCC more money and stressing out the crew.

5 Jayko responded, sarcastically, “oh, you’re just charming”; Hurchalla accused him of being sarcastic, which Jayko denied, adding (sarcastically) “oh, no . . . I meant that as a compliment.” (Tr. 144–146.)

10 Hurchalla’s dressing down of Jayko occurred in an area of the theater called the “crossover,” which is a large hallway backstage. Hurchalla testified that it is a “really boomy” area, meaning that it has very sheer walls and acoustics such that anything that is said in the area can be heard, as he put it, “big time” and “out as the audience almost.” According to Hurchalla, the two men remained about 20 feet apart during this entire exchange, which lasted approximately 3–4 minutes. During this time, he testified, he never raised his voice or yelled at Jayko; he described  
15 the exchange as calm and nonaggressive. This was at least partially corroborated by a current employee, Craig Lowe (Lowe), who was standing on the stage at the time with the stage doors open and testified that he did not hear Hurchalla yell at Jayko, but only raise his voice sufficiently to be heard long distance in the crossover. (Tr. 139, 147–149, 151–152, 155, 323–325.)<sup>12</sup>

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About 15 minutes later, Jayko returned to Hurchalla, telling him, “[w]e need to get something straight. We cannot have everybody hearing these issues.” He then explained that he was concerned and did not want the production (i.e., the talent and incoming production crew traveling with the show) “to hear the issues that was happening with the crew and him.”  
25 Hurchalla responded that he did not think that anyone in the production would have heard their discussion.<sup>13</sup> Jayko then stated, “[w]ell, this is a warning,” to which Hurchalla responded, “I don’t accept your warning.” Jayko walked away. Other than this verbal warning, Hurchalla never received any other discipline (written or otherwise) while dispatched to SCC. (Tr. 149–150, 227–228, 246, 353.)

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Later that day, Hurchalla filed a grievance against SCC based on the verbal warning, accusing SCC of issuing him an unwarranted discipline for his conduct as a steward. The following day, April 5, Weaver drafted a “Memo of Record,” describing the incident between Jayko and Hurchalla in which he claimed that Hurchalla had raised his voice in anger, and was  
35 “rude, insulting and completely insubordinate.” He then stated that Hurchalla’s grievance had no merit, in that his warning was not in any way related to his steward duties. Hurchalla credibly testified that Sandin’s April 5 memoranda was the only time he had ever been accused of insubordinate conduct while dispatched to SCC. (GC Exh. 37; Jt. Exh. 5; Tr. 243, 348.)

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On April 11, Weaver responded to Hurchalla’s grievance via an email that stated that SCC had disciplined him for “unacceptable behavior” that was “not related to [his] assigned duties as

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<sup>12</sup> I specifically reject Jayko’s version of this portion of the exchange, which was delivered awkwardly and with little eye contact. By his telling, he disengaged from the conversation and simply walked away as Hurchalla “kept saying things” at him in a raised voice; this sanitized account pointedly left out Jayko’s role in escalating the confrontation by turning around and demanding that Hurchalla explain what he had said earlier about teaching Jayko something about production management.

<sup>13</sup> Other than Lowe, there is no evidence that anyone had actually overheard the exchange.

a Steward.” Attached to Weaver’s email was a memorandum from Sandin stating that Hurchalla had been issued the verbal warning for “insubordinate conduct” and adding that “this represents a pattern of behavior that is not acceptable.” The following day, Hurchalla sent a response email, in which he stated that he had not raised his voice to Jayko and that he was being  
 5 disciplined based on a conversation in which he was attempting to police the parties’ contract. Weaver did not respond. (Jt. Exh. 3; GC Exh. 38; Tr. 156.)

Various management witnesses testified about Respondent’s handling of employee insubordination, outside of Hurchalla’s case. Sandin testified that, in 2013, Respondent  
 10 discharged an audio technician for insubordination. This individual was a Local 611 member but was employed on a regular basis by SCC (as opposed to an individual discharged for a particular production). This individual was alleged to have physically threatened SCC production manager Alex Saunders. Saunders is still employed at SCC but did not testify. (Tr. 372–373, 389–390.) Jayko admitted that another individual dispatched by Local 611, Chris Butler (Bulter), had, on  
 15 occasion, yelled at Jayko and insulted him, but received no discipline. According to Jayko, Butler acted on occasion as a steward, but only rarely. (Tr. 311–312.)

*d. May 2017: Management takes issue with Hurchalla as acting business agent*

20 In May 2017, Fitzsimmons took 7 days off and appointed Hurchalla to take over his duties in his absence. During that time, Hurchalla—using Fitzsimmons’ Local 611 email account—wrote to a representative of the Carmel Academy of Performing Arts (CAPA), which had an upcoming event at SCC. Stating that he had heard that a plan was in the works to eliminate the pre-hang day from this production, Hurchalla expressed concern that this would leave the crew without  
 25 enough time to prepare for the show and offered several ideas that would make the pre-hang day less expensive for CAPA. Hurchalla signed his email with an official Local 611 signature block as “Assistant Business Representative.” (Tr. 158–159, 244; GC Exh. 21.)

30 According to Sandin, Hurchalla’s directly contacting one of SCC’s clients was “absolutely totally outside of protocol” and “disconcerting,” in that it amounted to “a direct attempt to interfere, relationally, between SCC’s clients and our management staff.” Jayco concurred, explaining that he considered Hurchalla’s communication with CAPA “inappropriate” and that he had “overstepped his bounds.” This specific conduct by Hurchalla, he testified, was one of  
 35 the reasons that he eventually advocated for Hurchalla to no longer be dispatched to the theater. (Tr. 269–270, 377–378.)

*e. Winter 2017/spring 2018: Hurchalla spars with Jayco as a McCune employee and SCC requests that McCune not dispatch him*

40 For nearly 7 months, it would appear that no significant issues arose between Hurchalla and Jayco. As noted, during this period (beginning in September 2017), Respondent began using a subcontracting model, whereby it obtained Local 611 labor indirectly from subcontractors, including McCune Audio Visual (McCune). This staffing model was used for a production of the Smuin Ballet held between November 29 and December 3, 2017. The Union dispatched  
 45 crew for the show, including Hurchalla, who was also designated as steward for the production. (Tr. 160–163, 236, 293; GC Exh. 40.)

During the production, Hurchalla and Jayko disagreed over how to fix a malfunctioning speaker system. Ultimately, Jayko gave Hurchalla the system's schematics and asked him to try to troubleshoot the problem. Hurchalla then emailed McCune's sales and operations manager, Vince Hucks (Hucks); copying Fitzsimmons, Hurchalla reported what Jayko had instructed him to do. Hucks' response was swift and stern; he called Hurchalla and told him that he worked for McCune, not SCC, and that troubleshooting was not his duty and he was to focus on the work he had been scheduled to perform. Hurchalla later informed Jayko that his directive had been countermanded by Hucks; an apparently perturbed Jayko responded, "[o]h well, that just great." (Tr. 163–172.)

Three months later, on March 2, 2018, Pete Bender (Bender) of McCune emailed Jayko a list of stagehands, including Hurchalla, that he proposed be dispatched for an upcoming conference scheduled for May 2018. In response, Jayko called Bender and verbally instructed him not to dispatch Hurchalla. On March 19, Bender sent Jayko a revised list, with Hurchalla's name omitted. (Jt. Exhs. 9, 10; Tr. 305–307.) There is no evidence that Hurchalla was aware that Jayko had barred McCune from dispatching him.

*f. March 2018: Jayko bars Hurchalla from visiting backstage at SCC*

On March 23, Hurchalla attended a Smuin Ballet performance at the theater as an audience member. Notably, this performance was staffed with nonunion labor. With Fitzsimmons' assistance, he also arranged with the show's technical director, KT Graham (Graham) to visit with her backstage earlier in the day. This was not out of the ordinary, as productions sometimes invited guests backstage during a rehearsal or show. Shortly before the show's rehearsal began, Hurchalla, accompanied by his girlfriend, chatted with Graham backstage; as they spoke, two crew members who knew Hurchalla approached and greeted him. There is no evidence that their interactions were anything but cordial. Sometime later, Jayko spotted Hurchalla and approached him, stating that he was not permitted backstage. He then told Graham that Hurchalla was "not allowed to be here." (Tr. 72, 180–186, 189, 236, 294–297, 378–381; GC Exhs. 19, 20.)

Graham pushed back, maintaining that she had invited Hurchalla, and then she and Jayko discussed the matter privately in her office. When Graham emerged about 5 minutes later, she told Hurchalla that Jayko had accused him of making people on the crew "uncomfortable." Hurchalla said that was ridiculous, but, because he did not want to jeopardize Graham's production, he would leave and simply return that evening for the show. According to Fitzsimmons, neither Graham nor anyone else from Smuin Ballet contacted him to complain about Hurchalla after the March 23 event. Hurchalla likewise testified that neither Graham nor anyone from SCC contacted him to complain about his presence at the theater on March 23. (Tr. 74, 186–188, 190.)

*g. Late March/April 2018: Hurchalla files a California State overtime claim and SCC officially places him on "do-not-dispatch" status*

On March 29, 2018, Hurchalla filed an overtime claim with the California Department of Industrial Relations on behalf of Lowe and DeGiere, relating back to his 2016 claim that the parties' expired collective-bargaining agreement did not exempt SCC from California overtime laws. (Tr. 111.)

Six days later (on April 4), Fitzsimmons received an email from Bender at McCune. Referencing an upcoming event to be held at SCC, Bender noted that “Jayco requested that we do not dispatch [Hurchalla] to Sunset.” Fitzsimmons forwarded the email to Hurchalla.<sup>14</sup> Fitzsimmons telephoned Huckes at McCune, who explained to him that McCune had no issues with Hurchalla and in fact wanted him to work on the upcoming call. On April 9, Fitzsimmons received an additional email from Bender repeating that Jayco had requested that Hurchalla not be dispatched to calls as SCC, and noting that “we at McCune have absolutely no issue with [Hurchalla]” and “[w]e enjoy working with him and would happily put him on this or any other call.” (GC Exhs. 10, 11, 45.)

On April 11, 2018, Fitzsimmons emailed Sandin, Jayco and Weaver, as well as and Sue McCloud (McCloud) (a member of SCC’s board of directors), accusing SCC of discriminating against Hurchalla based on his union activities. Within the next 3–4 days, Respondent’s three-person (union) negotiating committee decided that, going forward, SCC would take a “zero tolerance” policy regarding Hurchalla. The negotiating committee at the time consisted of Board Members McCloud, Bob Kavner (Kavner), Sally Reed (Reed). Each of them was familiar with Hurchalla, as they had interacted with him regularly during bargaining. As of the hearing in this matter, McCloud and Reed had rotated off their positions as Board members, although they remained SCC donors; Kavner was still a current board member. (Tr. 57, 374–375, 391–393; GC Exh. 12.) None of the three testified.

On April 16, 2018, McCloud responded to Fitzsimmons’ email on behalf of the committee, stating that Hurchalla would continue on no-dispatch status, and adding the following explanation:

[t]here were significant issues with [Hurchalla] that arose prior to the signing of our latest agreement, including abusive/harassing conduct and bullying of [SCC] employees as well as client complaints. As an example, I am attaching a letter sent to him from Christine Sandin, Executive Director, in April 2017.<sup>15</sup> All of this resulted in him being placed on a “do not dispatch” list. While we have a new subcontracting agreement in place with Local 611, SCC is mandated under law to maintain a safe and healthy workplace, and a workplace free from harassment and abusive conduct, as well as remain a favored venue for our clients. Hence our position remains the same; namely, that Mr. Hurchalla continue to not be dispatched to our venue.

(GC Exh. 12.) When the upcoming SCC event staffed by McCune was eventually held (the following month), Hurchalla was not dispatched. (Tr. 54–55.)

<sup>14</sup> This was the first notice to Hurchalla that SCC had issued a broad “do not dispatch” order with respect to him. (Tr. 192.)

<sup>15</sup> No attachment to this email was introduced into the record, but McCloud was presumably referring to Sandin’s April 11, 2017 “Memorandum for Record” addressed to Hurchalla regarding his alleged insubordination on April 4, 2017. See Jt. Exh. 3 at 2.)

*j. May 2018: Hurchalla continues to pursue the overtime claim*

Two significant events happened in May 2018. First, Hurchalla ratcheted up his efforts to pursue Lowe and DeGiere’s overtime complaints; second, Jayko departed SCC and was replaced by Gary Brunclik (Brunclik).

On May 8, Hurchalla, accompanied by Lowe and DeGiere, attended a California Labor Commissioner’s conference regarding the overtime complaint the Union had been pursuing for 15 months. Hurchalla served as the employees’ representative; also in attendance were SCC officials Sandin and Weaver, along with Respondent’s legal counsel. Hurchalla argued that, because the employees had been paid pursuant to an unsigned, unilaterally imposed contract (i.e., SCC’s last, best and final offer), they were entitled by state law to overtime. He was unsuccessful, however, and the state agency found that it lacked jurisdiction over SCC. (Tr. 112, 113, 115–116.)

On May 11, Fitzsimmons emailed Bender and Hucks at McCune, inquiring whether Hurchalla would be deemed eligible for dispatch going forward considering that Jayko was no longer SCC’s production manager. On May 16, Hucks responded by forwarding an undated portion of an email he had apparently received from Weaver, which stated, “[w]e are not allowing dispatch of Andrew Hurchalla to Sunset Center as previously established with McCune. This request to not dispatch is still in effect until further notice.” The Union complied, and did not dispatch Hurchalla, through McCune, to any SCC events. (Tr. 57, 60, 195–196, 263; GC Exhs. 13, 14.)

On May 30, Hurchalla refiled Lowe and DeGiere’s overtime claim. On September 18, 2018, the California State Labor Commissioner issued notice that another hearing would take place on October 8, but this never came to pass, as SCC agreed to settle the overtime claims. (Tr. 112, 113, 115–116; GC Exhs. 30, 31.)

*k. Summer/fall 2018: Management wavers on its “do not dispatch” order*

It appears that, on two occasions in 2018, Respondent made an exception to “zero tolerance” policy regarding Hurchalla and allowed him to be dispatched to the theater. The first production he worked was the Carmel Bach Festival, a lengthy (30–35 day) annual music festival during July and August. This event, which had been held for many years, is organized differently than a typical production at the theater in that SCC does not provide stage crew but rather left the production company in charge of obtaining its own labor.<sup>16</sup> Under this model, Hurchalla had been dispatched by Local 611 to work this particular event for the past 7 years. Hurchalla’s 2018 experience with Brunclik, the new production manager, was a positive one and the men had no

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<sup>16</sup> While Sandin testified that, pursuant to SCC’s arrangement with the festival’s producer, Respondent had “zero” control over which employees were dispatched to the event, I do not fully credit this testimony. As Respondent’s table representative and final witness at hearing, she was privy to all other witness testimony; based on this, as well as her demeanor, it struck me that she was rather overselling the idea that Respondent was somehow forced to allow Hurchalla to work the Bach Festival. (Tr. 365–366.)

conflicts or disagreements.<sup>17</sup> According to Fitzsimmons, Brunclik respected the union crew and “valued” Hurchalla; he also told Fitzsimmons that things were going to change for the better and expressed his intention to “mend” the relationship between the Union and SCC. (Tr. 93–94, 193–196.)

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By October, it appears that a difference of opinions among SCC’s leadership had developed as to whether banning Hurchalla was still necessary in light of Jayko’s departure. On October 8, Weaver emailed SCC’s deputy director/event director, Mary Carrieri (Carrieri), copying Sandin:

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Moving forward, if [Hurchalla] is dispatched as a stagehand from the Local 611 hall, that’s one thing. We would allow that to be fair and consistent with how the Bach crew is provided. However, if McCune is trying to dispatch him, a decision has to be made on that. I know [Brunclik] wants to show our willingness to move forward with a fresh start, and I think that’s a good idea, but it’s a tough call.

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(Jt. Exh. 16.) Sandin disagreed, responding,

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He has to stay on the Do Not Dispatch. It’s an employee liability issue.

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He threatened and bullied [Jayko], and we have to assume he will do it again to whomever he has a beef with. [Brunclik] feels that they are all “good” at the moment, but this is a serious accusation that was made against [Hurchalla], we had evidence of it, and now we have a duty to protect the rest of our employees from it.

Liability, liability, liability.

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Id. At hearing, when asked to explain her response, Sandin offered a vague historical account of employee claims between 2012 and 2017 about workplace harassment—not by Hurchalla but other individuals—that she claimed had made individual Board members sensitive about their potential personal liability. Sandin did claim that Weaver and Jayko had approached her “at different times” to talk about their concerns with Hurchalla; she did not, however, specify what those concerns had been, nor did she identify what “serious accusation” had been made against Hurchalla or what “evidence” was presented to support it. (Tr. 382–383.)

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In any event, it does not appear that Sandin’s “zero-tolerance” position carried the day. Later in the year, in November, Hurchalla was again dispatched to work at SCC, this time for another music event that lasted 2 days. Again, he testified, he ran into no “issues” with the production. (Tr. 196–198.)

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<sup>17</sup> Respondent’s claim that Brunclik did not work on this production was credibly rebutted by not only Hurchalla but Fitzsimmons as well. (See Tr. 93–94.) Brunclik did not testify.

1. 2019: Respondent continues to waver on Hurchalla's dispatch status

During the spring of 2019, Respondent vacillated on Hurchalla's ban from the theater. Having retreated from its position that Hurchalla not be permitted to work at the theater under any circumstances, Respondent again changed course in March, removing him from an SCC job to which he had been dispatched; months later, however, he was permitted back to work at the annual Carmel Back Festival.

(i) March 2019: SCC ejects Hurchalla from its premises<sup>18</sup>

In March 2019, the Union received a labor request from Musson Theatrical (Musson), a company that installs rigging and other theatrical equipment. Musson had contracted with SCC's landlord, the City of Carmel, to provide some rigging and fly repair maintenance at the theater. On March 11, the Union dispatched Hurchalla as head rigger to assist Musson's in-house field technician, Willie Massurv (Massurv); he was also designated job steward. While the identity of the decisionmaker is not clear from the record, it is undisputed that SCC requested that the City of Carmel cause Hurchalla to be removed from the theater. (Tr. 60–62, 199, 200–203, 354–355.)

Hurchalla's ejection from the jobsite was not without some drama. Shortly after arriving at the theater, Hurchalla and Massurv were approached by SCC's acting assistant production manager, Kevin Proctor (Proctor), who demanded that they explain what they were doing at the theater. After Massurv explained, Proctor involved Carrieri at SCC. Next, Massurv got a voice-mail message from a City of Carmel official, Robert Estrella (Estrella). According to Hurchalla, who heard the message played, this official stated that he had just been contacted by "somebody" at SCC and that "they" were extremely upset that his assistant (i.e., Hurchalla) was present at the theater, that he was not supposed to be there and that, if he did not leave voluntarily, he would be escorted out by the police. Hurchalla began packing up his tools, and also texted Fitzsimmons that "they're calling the cops on me and they're kicking me out of the building." Fitzsimmons cautioned him to go quietly if the police showed up and not cause a scene, and to wait outside the building to speak with Estrella, who was en route. (Tr. 62–63, 202–204.)

As instructed, Hurchalla waited in the parking lot for Estrella. Once he arrived, Estrella apologized and told Hurchalla, "somebody doesn't want you here." As Hurchalla walked to his car, a City of Carmel police cruiser entered the parking lot and drove up to where Estrella and Massurv stood speaking.<sup>19</sup> At the same time, Hurchalla got in his car and drove away. According to Hurchalla, this was the last day he worked as a steward for SCC. Late that afternoon, he received an email from Fitzsimmons stating:

Due to today's mandate by [SCC], that you no longer be allowed in the building regardless of the employer your [sic] working for, you will be replaced on the following upcoming Monterey Symphony dates of 3/14, 3/15, 3/16, 3/17 and 3/18.

<sup>18</sup> Weaver, under questioning by counsel for the General Counsel, testified that this incident occurred on March 11, 2018, but I believe (based on the record as a whole, including contemporaneous emails regarding the events in question) that this was an innocent mistake on his part. (See, e.g., GC Exhs. 15, 46.)

<sup>19</sup> According to Hurchalla, the police cruiser came in without lights or a siren operating. (Tr. 206.)

(Tr. 64, 103, 204–206; GC Exhs. 15, 46.)

(ii) May 2019: Brunclik demands Hurchalla be reinstated

As noted, Brunclik replaced Jayco as SCC’s production manager in May 2018 and had expressed his desire to “mend” the relationship between SCC and Local 611. On May 29, 2019, Brunclik emailed Weaver and McCloud (copying Sandin), demanding that SCC cause its subcontractors, McCune and Musson, to issue a letter releasing Hurchalla from “do-not-dispatch” status. He stated, in relevant part,

This has gone on long enough, it’s punitive and retaliatory. We are shooting ourself [sic] in the foot by denying the best [head audio/head lighting] on the peninsula to serve us.

All this is in the past and there is no documentation I have been shown to prove the allegations against him.

(Jt. Exh. 17; see Tr. 122.) Sandin responded minutes later, stating that no such letter would issue. *Id.*

(iii) June 2019: Hurchalla is Specifically Requested by an SCC Client, and Respondent Makes an Exception to His Ban

As he had been in prior years, Hurchalla was dispatched in late June 2019, to work as the lighting director and head electrician for the annual 30-35 day Carmel Bach Festival at SCC. This time, he was specifically requested by the executive director of the event; SCC management, however, was aware of his presence. As Hurchalla testified, he interacted frequently with Brunclik and even exchanged greetings with Carrieri during the production. This event was the last time Hurchalla was dispatched to SCC. (Tr. 70, 207–208.)

On December 2, 2019, Carrieri emailed one of the Center’s labor subcontractors, Prime Time Entertainment, reiterating that Hurchalla was not to be dispatched to the Center, due to “customer complaints” and “problematic” conduct. (Jt. Exh. 11.)

*h. Respondent’s asserted rationale for banning Hurchalla*

Respondent’s main proffered rationale for banning Hurchalla is that it determined that permitting him to work at the theater would put SCC “at risk of harm to its employees,” subjecting it to liability for his conduct under federal anti-harassment law, as well as Section 6400(a) of the California Labor Code.<sup>20</sup> Giving Respondent the fullest benefit of the doubt, I have culled out from the record any evidence that might shed light on this defense.

<sup>20</sup> See generally *Franklin v. The Monadnock Co.*, 59 Cal.Rptr.3d 692, 151 Cal.App.4th 252 (Cal. App. 2 Dist. 2007) (Labor Code Section 1004(a) establishes an explicit public policy requiring employers to provide a safe and secure workplace, including a requirement that an employer take reasonable steps to address credible threats of violence in the workplace).

As noted, Sandin (who, as Respondent’s representative, observed the entire hearing) offered a somewhat meandering historical account of various employees raising concerns about workplace harassment, but the complaints in question were clearly not made about Hurchalla. (Tr. 382–383.) Nor did any witness identify what specific conduct by Hurchalla—other than him disagreeing with Jayko—was considered inappropriate in the workplace. According to McCloud’s April 16, 2018 explanation, Hurchalla’s “do-not-dispatch” status resulted from “significant issues” regarding harassment and bullying on Hurchalla’s part had arisen prior to September 2017. McCloud did not testify, leaving the record devoid of an explanation as to what these “significant issues” were or why, considering Respondent’s claimed hypersensitivity to liability for workplace harassment, Respondent failed for months to investigate or otherwise address his supposed malfeasance.

What emerges with relative clarity from the record is that Respondent’s top officials considered Hurchalla’s aggressive policing of the parties’ expired contract and criticism of Jayko’s job performance to amount to “harassment” and “bullying.” In this regard, it is worth noting that, when justifying Respondent’s 2018 do-not-dispatch order based on “abusive/harassing conduct and bullying of [SCC] employees,” McCloud pointed to Hurchalla’s alleged insubordination in April 2017, when he confronted Jayko about his lack of management prowess. (See GC Exh. 12; Jt. Exh. 3 at 2.) Respondent offered no evidence as to how Hurchalla’s conduct towards Jayko posed a liability to Respondent vis-à-vis its stage crew work force. According to Hurchalla’s unrebutted testimony, he was never made aware—during the entire time he was dispatched to SCC—that a coworker had complained that he had been hostile or aggressive towards them. Other than his interactions with Jayko, the record contains only two references to instances of harassment involving Hurchalla.

The first accusation that Hurchalla engaged in harassing conduct unrelated to his confrontations with Jayko came in through the testimony of Weaver, who claimed to have received a complaint about Hurchalla from SCC maintenance employee Jose Colocho (Colocho).<sup>21</sup> Weaver almost immediately backtracked, however, clarifying that Colocho did not make a “direct complaint” about Hurchalla, but rather occasionally requested that Weaver inform him if Hurchalla was working in a given building, so that he could arrange his maintenance work to avoid him. According to Weaver, Colocho had reported that Hurchalla had, on occasion, made him “feel uncomfortable.” Weaver testified that Colocho’s concerns about Hurchalla did not result in any discipline of the latter, nor were they documented in any way. As of the hearing, Colocho was still employed by SCC, but did not testify. (Tr. 333–335, 343–344.)

The second instance of alleged misconduct towards coworkers was based on Hurchalla’s December 1, 2017 appearance backstage during a non-union production at the theater. According to Respondent’s business records, this had created a complaint by the crew to Jayko that Hurchalla was “interrogating” and “watching” them, causing them to become uncomfortable. Weaver (who did not witness the incident) claimed that this was “the event that broke the camel’s back,” causing Jayko to convince the show’s production manager that Hurchalla was creating a hostile work environment and would be removed by the police if he failed to leave of his own accord. Weaver’s dramatic account, documented in his December 1, 2017 “Memo of Record,” went largely uncorroborated by Jayko, who testified simply that he

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<sup>21</sup> Colocho’s title as of the hearing in this matter was maintenance manager, but he is not alleged to be a supervisor or agent under the Act, and Respondent’s position is that he is an employee. (Tr. 333.)

spotted Hurchalla at the theater and told him to leave, omitting any reference to a crew complaint, hostile work environment discussion or threat to call the police. Jayko also flatly denied that Hurchalla’s surprise appearance at the theater was *not* the “breaking point” for him. (Tr. 243, 267–268, 296–297, 351–353; Jt. Exh. 19.)

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Respondent’s reliance on the December 1, 2017 incident is further undercut by the fact that it did not—and indeed, could not—have occurred on the day Weaver claimed, by his memo, that it did. As detailed above, Hurchalla had indeed been present at a Smuin Ballet production on December 1, in his capacity as a crew member and steward. This is evidenced by Hurchalla’s detailed testimony as to his various run-ins with Jayko during the production, as well as show’s steward’s report for the show, which indicates that Hurchalla was on the clock at the very time (2:15 p.m.) that he supposedly “showed up unexpectedly” during a nonunion production. As further noted, *supra*, Hurchalla did—in March 2018—make a backstage appearance at a non-union Smuin Ballet production; absent the application of time travel technology, however, this could not have formed the basis of Respondent’s December 2017 decision to place him on non-dispatch status. Confronted with this rather glaring inconsistency, Jayko became confused, ultimately conceding that “the timeline seems a little convoluted.” Weaver, for his part, was unable to explain how his December 4, 2017 “Memo or Record” could have summarized an event that would not occur until several months later. When pressed, he at first suggested that perhaps he had “mixed up” the dates and finally admitted that it was “possible” that the incident described in his “Memo of Record” in fact took place at the March 23, 2018 Smuin Ballet production. (Tr. 300–303; 308–309, 355–360; GC Exh. 40; Jt. Exh. 19.)

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Finally, I note that Respondent’s former manager, Jayko, offered a secondary rationale for banning Hurchalla. As he explained, an additional reason for banning Hurchalla was that, as Acting Business Manager, he had sent an unsolicited email to one of SCC clients, CAPA, raising concerns—on behalf of Local 611—about the stage crew not having enough time to prepare for the show. This, he testified, he considered inappropriate in that Hurchalla had “overstepped his bounds,” treading on his own field of responsibility by interacting directly with a client of SCC. (Tr. 270; GC Exh. 21)

### *Analysis*

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The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act of the Act by prohibiting subcontractors and/or customers from employing Hurchalla and causing them to remove him from working on events at SCC, in each case because he engaged in union activity. Respondent contends that its conduct was based not on Hurchalla’s union activity, but rather that it was motivated by a complaint lodged by a customer (The Panetta Institute), as well as a need to address Hurchalla’s inappropriate and harassing workplace conduct. Respondent also contends that the complaint is barred in its entirety by Section 10(b).

#### 1. Respondent’s Statute of Limitations Defense

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Respondent, by its answer, contends that Hurchalla “became aware that he was on the do not dispatch list on or about May 4, 2016, and therefore the charge and this Complaint are barred by the six month statute of limitations provided by Section 10(b) of the [Act].” (GC Exh. 1(e).) By its post-hearing brief, Respondent asserts a slightly more nuanced theory, stating, “Mr. Hurchalla

knew on or about May 4, 2016 that he was on a Do Not Dispatch list with regard to Panetta Institute events, and he knew on or about April 16, 2018 that he was on a complete Do Not Dispatch list.” (R. Br. at 7.)

5 General Counsel offers several arguments against application of the statute of limitations here, based on Respondent’s admittedly causing subcontractor Musson to eject Hurchalla from the theater on March 11, 2019, within the limitations period. This action, it is argued, ‘breathed life’ into the complaint allegations. For the reasons set forth below, I find partial merit to each of the parties’ positions.

10 *a. The 10(b) standard*

15 Section 10(b) of the Act provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.” It is therefore a statute of limitations which extinguishes liability for unfair labor practices committed more than 6 months prior to the filing of the charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309, fn. 9 (1959). The limitations period under Section 10(b) is an affirmative defense and Respondent has the burden of showing that the charge was untimely under Section 10(b). *NLRB v. Public Service Electric and Gas Co.*, 157 F.3d 222, 228 (3d Cir. 1998).

25 In *Machinists Local 1424 v. NLRB (Bryan Mfg.)*, 362 U.S. 411, 416–417 (1960), the Supreme Court differentiated between two categories of limitations cases. The first category involves cases where an occurrence within the 6-month limitations period constitutes an unfair labor practice in and of itself. The Court noted that earlier events might be utilized to shed light on the unfair labor practice, but such evidence is background. Such cases are not time barred. The second category involves conduct which occurred during the limitations period which does not in and of itself constitute an unfair labor practice without reference to a time-barred event. This category is time barred.

30 The 10(b) period commences, however, only when a party has clear and unequivocal notice—either actual or constructive—of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party knew or should have known that his statutory rights have been violated. *Castle Hill Health Care Center*, 355 NLRB 1156, 1191 (2010); *Ohio & Vicinity Regional Council of Carpenters*, 344 NLRB 366, 367–368 (2005); *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004); *Concourse Nursing Home*, 328 NLRB 692, 694 (1999); *Leach Corp.*, 312 NLRB 990, 991 (1993). Actual or constructive knowledge may be ascribed where the conduct was “sufficiently ‘open and obvious’ to provide clear notice” and/or where the party would have discovered the violation had it exercised reasonable diligence. See *Ohio & Vicinity*, supra at 367–368; *Duke University*, 315 NLRB 1291 n.1 (1995); see also *Phoenix Transit System*, 335 NLRB 1263 n.2 (2001) (charging party was “on notice of the facts that reasonably engendered suspicion that an unfair labor practice occurred,” and could have been discovered by exercising due diligence).

45 *b. Application of Section 10(b) bars certain portions of the complaint*

The charge triggering the instant case was filed on June 3, 2019. Thus, to the extent that Respondent has proven that, more than 6 months prior to that date, Hurchalla either knew or

should have known of the acts which gave rise to the complaint allegations, they are untimely. In undertaking this analysis, it is useful to consider the two distinct categories of conduct alleged in the complaint. Specifically, Respondent is accused of: (a) prohibiting subcontractors from employing Hurchalla and causing them to remove him from working on events at SCC; (b) 5 prohibiting customers from employing Hurchalla and causing them to remove him from working on events at SCC. As set forth below, I find that the charge is untimely as to the latter category (involving customers), but timely as to the former (involving subcontractors).

Turning first to the “customer” allegations, the record contains evidence of only one 10 customer of SCC playing any role in barring Hurchalla from the theater: The Panetta Institute. In this regard, the record is clear that Hurchalla was made aware in May 2016 and again in February 2017 that he would not be permitted to work at future Panetta Institute events. Nor is there any evidence that, following February 2017, any Panetta Institute events were actually held at SCC. See *Bonwit Teller, Inc.*, 96 NLRB 608 (1951) (finding Section 10(b) bars the resting of 15 an unfair labor practice finding upon the bare presumption of continuity of an unlawful practice which is shown to have occurred prior to the 6-month period). Because the record contains no evidence of Respondent allegedly prohibiting any customer from utilizing Hurchalla within the limitations period, I agree with Respondent that this aspect of the complaint is time barred.

An analysis of the allegations involving subcontractors, however, produces a different result. 20 Respondent’s actions in causing subcontractor Musson to eject Hurchalla from SCC on March 11, 2019, constitutes conduct of the type that the *Bryan Mfg.* Court identified as not time barred: that which occurs within the limitations period and constitutes an unfair labor practice in and of itself, without reference to pre-limitations conduct. See *Iron Workers Local 433*, 341 25 NLRB 523, 523 n.1 (2004) (refusal to allow discriminatee to register for referrals during 10(b) period timely where unlawful without reference to conduct outside limitations period); *Stage Employees IATSE Local 720*, 332 NLRB 1, 1–2 (2000) (failure to refer discriminatee within limitations period timely as separate event occurring within limitations period); *Electrical Workers IBEW Local 6 (San Francisco General Contractors)*, 318 NLRB 109, 126 (1995) 30 (enforcement during limitations period of unlawful hiring hall rule or practice promulgated outside limitations period timely), enfd. 139 F.3d 906 (9th Cir. 1998); see also *South East Coal Co.*, 242 NLRB 547, 551 (1979) (in refusal to hire case “each unlawfully motivated refusal to hire . . . is a separate and distinct unfair labor practice. . .”).

Based on these authorities, I find that Respondent’s causing subcontractor Musson to eject 35 Hurchalla from its worksite was a separate event that started the running of the 10(b) period and that, therefore, the complaint is timely to the extent it alleges that Respondent unlawfully prohibited subcontractors from employing Hurchalla and causing them to remove him from working on events at SCC.

## 40 2. Hurchalla’s Ejection and Ban from SCC

Section 8(a)(3) of the Act provides, in relevant part, that it is “an unfair labor practice for an 45 employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging “membership in any labor organization” has long been held to include, more generally, encouraging or

discouraging participation in concerted or union activities. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39–40 (1954); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963).

5 In cases involving alleged discriminatory discipline where the employer's motive is at issue (i.e., where the employer claims to have based its decision on conduct separate and apart from the employees' alleged protected conduct), the Board employs the burden shifting analysis set forth in *Wright Line*,<sup>22</sup> which I will discuss in more detail below. *Wright Line*, however, does not apply to situations in which the employer asserts that discipline was justified by misconduct occurring within the course of otherwise protected conduct. In such cases, the employer will be found to have violated the Act, irrespective of its motive or showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981).

15 As the Board has recognized, the appropriate analytical framework to apply to an allegedly discriminatory disciplinary action depends on the rationale the respondent asserts for that action. See *Nestlé, USA, Inc.*, 370 NLRB No. 53, slip op. at 1 n.2 (2020); *MCPC, Inc. v. NLRB*, 813 F.3d 475, 487–490 (3d Cir. 2016); *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135–1136 (D.C. Cir. 2003), enfg. 337 NLRB 915 (2002). For that reason, I have analyzed certain facets of Respondent's defense under *Wright Line* and others under *Burnup & Sims*.

20 *a. Burnup & Sims dictates that Respondent was not privileged to ban Hurchalla for misconduct allegedly occurring during his conduct as a union representative*

25 The Board has consistently ruled that the Act is violated if an employer takes an adverse action against an employee for "misconduct arising out of a protected activity, despite the employer's good faith belief, when it is shown that the misconduct never occurred." *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). Under the *Burnup & Sims* analysis, the General Counsel has the initial burden of proving that the employee was subjected to an adverse employment action during the course of protected activity. If the General Counsel sustains its initial burden, the employer must then establish that it held an honest, good-faith belief that the employee engaged in serious misconduct. Serious misconduct occurs when "the employee's activity is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate coworkers." *Aqua-Aston Hospital, LLC*, 365 NLRB No. 53, slip op. at 5–6 (2017) (citing *Clear Pine Mouldings*, 268 NLRB 1044 (1984)). After the employer shows that it held a good-faith belief that the employee committed serious misconduct, the burden shifts back to the General Counsel to establish, despite the employer's good-faith belief, the misconduct never occurred. *Aqua-Aston Hospital*, supra, slip op. at 5; *Akal Security, Inc.*, 354 NLRB 122, 124–125 (2009), reaffd. 355 NLRB 584 (2010); *Taylor Motors*, 365 NLRB No. 21 (2017). "Thus, an employer who disciplines an employee for misconduct within the course of otherwise protected activity will be found to have violated the Act where the evidence discloses that: (a) it did not honestly believe the serious conduct occurred; or (b) even if it did so believe, it was mistaken." *Aqua-Aston Hospitality, LLC*, supra, slip op. at 6.

45 I find that, to the extent Respondent relied on Hurchalla's "inappropriate" interactions with Jayko, which it claims amounted to the creation of a hostile work environment, *Burnup & Sims*

<sup>22</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

provides the correct analytical framework. This is because each of the interactions relied on by Respondent involved Hurchalla, in his role as steward, either policing the parties' expired collective-bargaining agreement or expressing his disagreement with Jayko's day-to-day management decisions, insofar as they negatively impacted union-dispatched crew members.

5 Such steward activity "embodies the essence of protected concerted activities." *General Motors Corp.*, 218 NLRB 472, 477 (1975), *enfd.* 535 F.2d 1246 (3d Cir. 1976); *USPS v. NLRB*, 652 F.2d 409, 412 (5th Cir. 1981).

10 Accordingly, I find that the General Counsel has met its initial burden under *Burnup & Sims*. The burden then shifts to Respondent to establish that it held a good-faith belief that Hurchalla engaged in "serious misconduct" during his interactions with Jayko. This I find Respondent failed to do. Notably, other than cursory claims that Hurchalla's treatment of Jayko put Respondent "at risk of harm to its employees," there is simply no credible evidence to suggest that Respondent was, in fact, concerned that Hurchalla's spirited exercise of his Section 7 rights threatened to subject Respondent to legal liability, whether as an actionable "hostile work environment" claim or pursuant to Respondent's duty to provide a safe work environment under California law, such that banning him became necessary. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (to be actionable under Title VII, conduct must be severe or pervasive, based on protected characteristics, and objectively and subjectively hostile or abusive).

20 Even assuming that Respondent held such a good-faith belief, I find that the credible evidence establishes that, in fact, at no time during his frequent dressing down of Jayko did Hurchalla engage in misconduct, serious or otherwise. As one court of appeals has explained, because tensions often run high during a steward's interactions with management, the Act's protections "would be seriously threatened if the employer could" insist that any emotional and argumentative point made during the discussion could lose the protection of the Act. *USPS v. NLRB*, *supra* at 412. Accordingly, it is well established that a union steward, acting in his or her official capacity may not be lawfully disciplined for conduct that is normally considered discourteous, disrespectful, belligerent, or even insubordinate. See *Lion Elastomers LLC*, 369 NLRB No. 88, slip op. at 20 (2020) ("[i]n the context of grievances, the standard is a high bar, and inflammatory, rude, or even profane language does not meet that bar—rather, such language is part of the *res gestae* of the grievance discussion") (citations omitted).

35 Likewise, where a steward directly confronts management over proposed action he considers unlawful, he does not commit misconduct justifying discipline, even where his conduct may be considered "disorderly, antagonistic and disrespectful." See *Noble Metal Processing, Inc.*, 346 NLRB 795, 798 (2006); see also *Lana Blackwell Trucking*, 342 NLRB 1059, 1062 (2004) (employee representative directing "disrespectful, angry and shocking outbursts that embarrassed and humiliated" company president not lawfully disciplined, where he was challenging allegedly unlawful management actions).

45 Hurchalla's skirmishes with Jayko, by all accounts, grew out of what Hurchalla considered to be contractual violations. Significantly, his most arguably indecorous conduct towards Jayko—his raised-voice dressing down of the latter's management skills in a "boomy" area backstage where he was overheard by at least one other employee, grew out of Jayko's announced intention to place Hurchalla on a multi-hour break which Hurchalla considered a contract violation. It is undisputed that, at no time during his confrontations with Jayko, did Hurchalla use any profanity or vitriol, make threats or engage in physical contact. Even assuming that, on occasion,

Hurchalla raised his voice and spoke out forcefully when raising concerns about Jayko’s management style, he did not, under any reasonable view, engage in conduct that could reasonably be considered insubordinate or disruptive of the workplace sufficient to be considered “serious misconduct.” See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (federal anti-harassment law does not constitute “a general civility code for the American workplace”).

Another proffered rationale for banning Hurchalla is amenable to analysis under *Burnup & Sims*. Specifically, as detailed above, Respondent presented evidence at hearing that Jayko recommended that Hurchalla be banned from SCC based on his directly contacting CAPA, one of the theater’s customers. Specifically, according to Jayko, who was responsible for recommending Hurchalla be banned from SCC, his decision was based, in part, on his “overstepping his bounds” by contacting one of SCC’s clients (CAPA) in order to advocate that the crew be awarded an extra day of work (i.e., the “pre-hang” day) in which to set up for a production. To the extent Respondent relies on Hurchalla’s contact with CAPA as Local 611’s Acting Business Manager, I find this defense likewise fails under *Burnup & Sims*.

Section 7 of the Act generally protects employees when they appeal to customers for support in a labor dispute with their employer “where the communication [does] not constitute a disparagement or vilification of the employer’s product or its reputation.” *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229, 230 (1980), *enfd.* 636 F.2d 1210 (3d Cir. 1980); see also *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990). In this case, the content of Hurchalla’s email to CAPA made it clear that he was enlisting it in an effort to improve the quality of their production while increasing the number of hours afforded to crew members for a “pre-hang” day, in contravention of SCC’s directive. Insofar as nothing contained in the email served to disparage or vilify Respondent, Hurchalla’s act of contacting CAPA constituted protected union activity, shifting the burden to Respondent to demonstrate that it held a good-faith—and correct—belief that Hurchalla nonetheless committed serious misconduct in the course of this communication.

In this regard, I credit Respondent’s witnesses Weaver and Jayko, who were each plainly outraged by what they considered a serious breach in protocol. Thus, I find that Respondent did, in fact, harbor a good-faith belief that the email to CAPA constituted serious misconduct. This, however, is not the end of the inquiry but rather shifts the burden back to the General Counsel to prove that the misconduct Respondent perceived did not, in fact, occur. I find that the General Counsel has met this burden, in that, based on the Board’s standards for contacting an employer’s customers, Hurchalla’s conduct was wholly appropriate and protected. Thus, Respondent relied on its good-faith belief at its own peril, and *Burnup & Sims* dictates that this defense must fail.

*b. Under Wright Line, Respondent permanently banned Hurchalla based on his protected union activities*

As noted, to the extent Respondent banned Hurchalla based on his alleged insubordination to Jayko, I have found that *Burnup & Sims* controls my analysis. However, to the extent that Respondent claims to have been motivated by different, unprotected conduct by Hurchalla, a mixed-motive analysis under *Wright Line* is necessary. In this regard, Respondent contends that it received complaints that Hurchalla made nonunion stage crew uncomfortable and

“interrogated” them inappropriately and additionally that maintenance employee Colocho requested not to work in the same physical area as him. Respondent claims that, based on these complaints, as well as on Hurchalla’s interactions with Jayko, it was compelled to remove him from the workplace in order to fulfill its affirmative duty to provide workers with a safe and harassment-free workplace.

(i) The *Wright Line* standard

As noted, supra, where the respondent’s proffered justification for its action relies on events other than protected conduct, the *Wright Line*, “mixed motive” framework applies to the question of whether such justification renders the conduct lawful. *Fresenius USA Manufacturing, Inc.*, 362 NLRB 1065, 1066 (2015); *Alton H. Piester, LLC*, 353 NLRB 369, 372 n.25 (2008). Under that framework, the General Counsel must prove by a preponderance of the evidence that an employee’s protected concerted activity was a motivating factor (in whole or in part) for the employer’s adverse employment action. “The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer.” *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014). Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed.Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 26–27 (2018), and cases cited therein. In this regard, it is not sufficient for the employer merely to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Instead, it “must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence.” *Weldun International*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998); see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting employer’s claim that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action).

That said, under the *Wright Line* framework, as part of his initial showing, the General Counsel may also offer proof that the employer’s reasons for the personnel decision were pretextual. *Con-Way Freight, Inc.*, 366 NLRB No. 183, slip op. at 2–3 (2018) (citing *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003)); *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 n.11 (1997)). Indeed, where the employer’s proffered reason is shown to be pretextual, “the factfinder may not only properly infer that there is some other motive, but ‘that the motive is one that the employer desires to conceal—an unlawful motive. . . .’” *Id.* (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (citation omitted)). Thus, as the Board recently reiterated:

A finding of pretext defeats any attempt by the [r]espondent to show that it would have discharged the discriminatees absent their union activities. This is because where “the evidence establishes that the reasons given for

the [r]espondent’s action are pretextual—that is, either false or not in fact  
 relied upon—the [r]espondent fails by definition to show that it would  
 have taken the same action for those reasons, absent the protected conduct,  
 and thus there is no need to perform the second part of the *Wright Line*  
 analysis.

*Con-Way Freight, Inc.*, supra at 2–3 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385  
 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981)). It follows that “the mere existence of  
 a valid ground for [discipline] is no defense to an unfair labor practice charge if such ground was  
 a pretext and not the moving cause.” *Id.* at 3 (quoting *NLRB v. Yale Mfg. Co.*, 356 F.2d 69, 74  
 (1st Cir. 1966)), enfd. 182 F.3d 622 (8th Cir. 1999) (citation omitted).

(ii) Application of the *Wright Line* standard

Applying the *Wright Line* principles, I find that the counsel for the General Counsel has met  
 his burden that the decision to place Hurchalla on permanent, “do-not-dispatch” status was  
 motivated by his union and other protected activity and that Respondent failed to show that it  
 would have taken the same action absent such protected activity.

(a) The General Counsel has established a prima facie case of discrimination

For the following reasons, I find the General Counsel has met his initial burden of  
 establishing that Hurchalla’s union activity was a substantial or motivating factor for  
 Respondent’s decision to cause Musson to eject and ban him from SCC.

The General Counsel clearly established that Hurchalla, as a steward, executive board officer  
 and occasional acting business agent for Local 611, engaged in frequent, open and zealous  
 advocacy for Local 611-dispatched crew, including aggressively policing the parties’ contract  
 and filing multiple grievances. In addition to these activities, Hurchalla served in prominent  
 posts with the Local and was involved in collective-bargaining negotiations with Respondent in  
 the 3 years preceding his ban from SCC. Perhaps most notably, Hurchalla spearheaded an  
 overtime grievance challenging Respondent’s position that it was exempt from overtime  
 requirements with respect to its union-represented workforce. While his arguably  
 confrontational style may have been viewed by Jayko as gruff and even uncivil, this is not the  
 point. See *Tamara Foods*, 258 NLRB 1307, 1308 (1981) (whether employees could have  
 protested working conditions in a “more efficacious or reasonable manner,” irrelevant to analysis  
 of protected conduct), enfd. 692 F.2d 1171 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983).

Second, the General Counsel has established that Hurchalla’s union activity, including  
 grievance filing and service on the Local’s negotiating committee, were known to top  
 management, and he regularly clashed openly with Jayko over contract interpretation issues.  
 Finally, it is appropriate to impute knowledge of these activities to the members of Respondent’s  
 “negotiating committee,” who ultimately decided that he would not be dispatched to SCC. See  
*Airgas USA, LLC*, 366 NLRB No. 92, slip op. at 7 (2018) (“[i]t is well established that the Board  
 imputes a manager’s or supervisor’s knowledge of an employee’s protected concerted activities  
 to the decision-maker, unless the employer affirmatively establishes a basis for negating such  
 imputation”) (citations omitted). As such, I conclude that Hurchalla was engaged in protected  
 union conduct and that Respondent was keenly aware of such conduct.

The General Counsel has also made a strong case that Respondent harbored animus towards Hurchalla's union activities. The record discloses that Respondent considered Hurchalla's protected conduct—including his insistence on adhering to the parties' contract, defending bargaining unit work, asserting his authority as acting business manager, discussing unit employees terms and conditions with SCC clients and allegedly<sup>23</sup> interviewing nonunion crew at the theater about their terms and conditions of employment—to constitute an unacceptable incursion on management's own authority. On a day-to-day basis, this was demonstrated by Jayko's discomfort in dealing with Hurchalla as a steward, as well as Jayko's statements of hostility towards Hurchalla's union activity, which he described as inappropriate, opportunistic and "consistently confrontational."

Even more glaring evidence of animus against Hurchalla's union activity was management's reaction to his persistence in pursuing overtime time pay for crew members. In 2016, after Hurchalla first accused SCC of shorting employees their earned overtime, Weaver complained to the Union that Hurchalla, as a mere steward, had no standing to challenge Respondent's position that it was exempt from overtime requirements. On the very same day, Weaver began floating scenarios in which Respondent could rid itself of Hurchalla without creating "a legal mess," which included waiting for Hurchalla to get into a disagreement at work while *not* acting as a steward and then disciplining him. Notably, this scheme was laid out in the very same email in which Weaver expressed concern that Hurchalla's overtime claim had merit and his challenge to Respondent's exemption theory was "a big deal."

Against this backdrop, I find additional evidence of antiunion intent in the slapdash manner in which management attempted to build a case against Hurchalla. Despite his history of run ins with Jayko, it was only after Weaver floated the idea of seizing on a rationale for disciplining Hurchalla that Jayko issued him a verbal warning for supposedly being "rude, insulting and completely insubordinate." The insubordination this time: accusing Jayko of mismanaging employees' breaktimes and thereby stressing out the crew. The sheer flimsiness of Respondent's alternative case against Hurchalla—that his strident advocacy for his coworkers somehow threatened to subject them to a hostile work environment—itself speaks volumes, especially considering that his unspecified acts of "harassment" were admittedly never investigated. See *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1996) (failure to adequately investigate the alleged misconduct supports inference of animus); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988) (failure to adequately investigate an employee's alleged misconduct has been found to be an indication of discriminatory intent).

Finally, perhaps the most powerful evidence of animus is inferred through the suspect timing of the decision by Respondent to ban him from the theater—within two weeks of his filing an overtime claim with the California Department of Industrial Relations on behalf of Lowe and DeGiere. The Board has long recognized that "the timing of the [employer's conduct] is strongly indicative of animus." *A.S.V., Inc.*, 366 NLRB No. 162, slip op. at 36 (2018) (quoting

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<sup>23</sup> To the extent that Hurchalla himself denied engaging in such conduct, I find this immaterial, inasmuch as management, per Respondent's own business records, was apparently under the impression that he had. See *Hyundai Motor Manufacturing Alabama, LLC*, 366 NLRB No. 166, slip op. at 2 (2018) (finding unlawful discharge based on decisionmakers' belief employees engaged in protected concerted activity "regardless of whether they actually did so") (citations omitted).

*Electronic Data Systems*, 305 NLRB 219, 220 (1991), *enfd.* in relevant part 985 F.2d 801 (5th Cir. 1993)); see also *North Carolina Prisoner Legal Services*, 351 NLRB 464, 468 (2007) (timing of employer’s action in relation to protected activity provides reliable evidence of unlawful motivation) (citing *Davey Roofing Inc.*, 341 NLRB 222, 223 (2004)); *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (discriminatory motive revealed by timing between discipline and discovery of employee’s protected activities). Respondent’s efforts to backdate the permanent ban decision (in order to dissociate it from the overtime claim), as well as prop up its decision to ban Hurchalla with shifting and unsupported explanations (i.e., insubordination versus coworker harassment) are additional strong indicia of Respondent’s unlawful motive. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (2018); *Novato Healthcare Center*, 365 NLRB No. 137, slip op. at 16 (2017); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *Austal USA, LLC*, 356 NLRB 363, 363 (2010).

(b) Respondent’s *Wright Line* defense

Having found that the General Counsel has proven that Hurchalla’s union activity was a motivating factor for his suspension, the burden shifts to Respondent to offer a legitimate, nondiscriminatory explanation for its actions. As the Board has noted, the respondent’s burden under *Wright Line* is “not to identify legitimate grounds for which it *could* impose discipline, but to persuade that it *would* have disciplined the employee even absent his or her protected activity.” *Wendt Corp.*, 369 NLRB No. 135, slip op. at 2 (2020). This Respondent has failed to do.

Respondent’s main proffered rationale for placing Hurchalla on “do not dispatch” status is that he engaged in “abusive” and “harassing” conduct, including “bullying” of SCC employees, which in turn exposed Respondent to legal liability based on federal anti-discrimination law and/or its duty under California state law to provide a “safe and healthful” place of employment to its employees. It is true that employers may face a “Catch 22” when employee conduct protected by the Act nonetheless constitutes verbal harassment sufficient to trigger liability under state or federal law.<sup>24</sup> Respondent contends that it was “extremely sensitive” to this potential liability because, in 2013, it had been forced to discharge another employee for “insubordination and threatening behavior.” (R. Br. at 12.) At hearing, Weaver led this charge, testifying that the “breaking point” occurred when Hurchalla appeared backstage, generating a complaint that he had made non-union crew members “uncomfortable” and causing Jayko to consider calling the police to remove him.

I do not credit Weaver’s account, for several reasons. First, he was not present during the incident and appears to have embellished its details to a significant degree. Former manager Jayko recounted a far more low-key interaction, during which he simply spotted an off-duty Hurchalla backstage and told him to leave, making no mention of employee complaints or threatened police involvement. He also flatly denied that the event constituted a “breaking point” with respect to Hurchalla. Moreover, Weaver’s documentation of the incident incorrectly states that it took place in December 2017, while the credible evidence concretely establishes that Hurchalla’s appearance backstage did not actually occur until March of the following year.

<sup>24</sup> See generally Molly Gibbons, *License to Offend: How the NLRA Shields Perpetrators of Discrimination in the Workplace*, 95 Wash. L. Rev. 1493 (Oct. 2020) (discussing *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001)).

In any event, even had Hurchalla's appearance backstage made some employees uncomfortable, it is highly implausible that this would be considered the sort of "harassment" necessitating his total ban from the theater. See *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (prounion statements that merely cause another employee to feel "uncomfortable" not lawfully characterized as "harassment" sufficient to justify discipline).

Weaver's "back-up" harassment scenario was based on Colocho, the maintenance employee who allegedly requested to work at a distance from Hurchalla. Colocho, however, failed to testify and there is no indication that his requests (if they ever existed) were considered to raise issues of harassment or bullying, or that they resulted in any investigation by Respondent. Indeed, the record is devoid of credible evidence that Respondent in fact received, let alone investigated, a single employee complaint about Hurchalla acting in a threatening or otherwise inappropriate manner. See *Rood Trucking Co., Inc.*, 342 NLRB 895 (2004) (failure to investigate alleged misconduct constitutes strong evidence of pretext); *Golden State Foods*, 340 NLRB 382 (2003) (same). As the Board recently noted, an employer's defense based on a claimed "zero tolerance" policy against workplace harassment will not carry the day when it is inconsistent with its failure to respond to harassment allegations in a meaningful way, other than singling out the discriminatee for punishment. *Wendt Corp.*, supra at 3.

Ultimately, Respondent's witnesses failed to identify any bullying or harassing conduct to which Hurchalla had supposedly subjected his coworkers. Indeed, the most charitable interpretation of its defense is rather that Hurchalla, at some point in his dealings with Jayko, engaged in conduct that resulted in a "serious" but nonspecific accusation against him, backed by unidentified evidence, leading Respondent to conclude that Hurchalla posed a potential threat to his coworkers in the form of either hostile or otherwise unsafe work environment. Vetted against the record evidence, this both gauzy and histrionic account fairly screams of pretext for rather obvious reasons. First, despite the lack of affinity between Jayko and Hurchalla, there is no indication that any of their disputes between the two involved actual or threatened physical harm, "adult" or otherwise offensive language or other derogatory terms. Nor is there any credible evidence management in fact believed that Hurchalla's interactions with Jayko posed a potential threat to crew members, such that banning him became necessary to avoid legal liability.<sup>25</sup> Indeed, Respondent did not even follow through with its declared "zero tolerance" policy against Hurchalla, but rather selectively allowed him to work (e.g., the two month-long Carmel Bach Festival events) when its clients demanded him. Finally, Respondent's own production manager Brunclik considered the allegations against Hurchalla baseless, undocumented and retaliatory.

In contrast to Respondent's shifting, implausible and exaggerated claims regarding Hurchalla stands a single compelling storyline: he was an outspoken steward and union official whose duties included keeping detailed records of the hours worked by union-dispatched crew members, and who had officially accused SCC of incorrectly designating itself exempt from state overtime obligations with respect to such employees. The consistent linkage between Respondent's actions aimed to bar Hurchalla and his escalation of the overtime claim strongly supports an inference that this protected conduct was what motivated his ban from the theater. Notably, management first considered ridding itself of Hurchalla almost immediately after he

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<sup>25</sup> Apparently, Respondent felt no compulsion to issue similar preemptive discipline to another potential future harasser, crew member Butler, who was known to have yelled at Jayko and even insulted him.

began advocating on behalf of Lowe and DiGiery. In that regard, I take Respondent’s witness Sandin at her word; as she testified, the original idea of placing Hurchalla on “do-not-dispatch” status arose out of Weaver’s December 2016 email complaint about Hurchalla’s persistence in maintaining the Lowe/DiGiery overtime claim under the subject line, “Union Issues.” The record also contains compelling evidence that that Respondent did, in fact, reach a “breaking point” with Hurchalla: within 2 weeks of his filing the Lowe/DiGiery overtime claim with the California Department of Industrial Relations, Hurchalla—at SCC’s request—was barred from dispatch by subcontractors McCune and Bender. The very same month, Weaver seized upon Hurchalla’s appearance backstage in his overzealous effort to document Hurchalla’s supposed harassment.<sup>26</sup>

Because no member of Respondent’s three-person negotiating committee testified and no management official took credit for the later decision to have him removed from the theater, the record contains no explanation as to what, if anything, the decision to ban Hurchalla—characterized by Respondent’s own production manager as “punitive and retaliatory”—actually had to do with a legitimate concern over workplace harassment. Thus, no testimony spoke directly to Respondent’s motive and refuted the inference that Respondent’s claimed hypervigilance regarding workplace harassment was merely a pretextual, post-hoc attempt to justify its reaction to Hurchalla’s persistent habit of forcing Respondent to adhere to its obligations as an employer. *Sound One Corp.*, 317 NLRB 854, 858 (1995) (where an employer has shifted reasons for its actions, “an inference may be drawn that the real reason for its conduct is not among those asserted”) (citation and internal quotation omitted), enfd. mem. 104 F.3d 356 (2d Cir. 1996); *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991) (noting that “it is...well settled...that when a respondent’s stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal”), enfd. mem. 976 F.2d 744 (11th Cir. 1992).

For the reasons set forth herein, I find that, based on the preponderance of the evidence, Respondent banned Hurchalla not out of a concern for workplace safety but rather based on his unyielding union advocacy, thereby violating the Act.

#### CONCLUSIONS OF LAW

1. Respondent Sunset Cultural Center (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, Local Lodge 2949, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act with 9(a) status under the Act.

3. Respondent has violated Section 8(a)(3) and (1) of the Act by prohibiting its subcontractors from employing Hurchalla to perform work at its theater facility and causing them to remove him from working on events at that facility, in each case for engaging in union and other protected conduct.

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<sup>26</sup> As noted, I do not credit Respondent’s rather obvious effort to back date the decision to permanently ban Hurchalla in an effort to decouple it from Hurchalla’s overtime complaint on behalf of Lowe and DiGiery.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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## REMEDY

10 Having found that Respondent has engaged in certain unfair labor practices in violation of Sections 8(a)(5), (3), and (1) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Therefore, I shall recommend that Respondent, having discriminatorily caused employee Anthony Hurchalla to be prohibited from performing work at its theater facility and causing him to be removed from that facility, should be required to restore the status quo ante by rescinding these actions and removing all references to them from Respondent's files. Further, I shall recommend that Respondent should make Hurchalla whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent should be ordered to compensate the above-named employees for the adverse tax consequences, if any, of receiving lump sum backpay awards and to file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In addition to the backpay-allocation report, Respondent must file with the Regional Director a copy of Hurchalla's corresponding W-2 form(s) reflecting the backpay award.

25 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>27</sup>

## ORDER

30 Respondent Sunset Cultural Center, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

35 (a) Prohibiting its subcontractors from employing Anthony Hurchalla to perform work at Respondent's theater facility.

(b) Causing its subcontractors to remove Anthony Hurchalla from working on events at Respondent's theater facility.

40 (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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<sup>27</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

5 (a) Rescind the ban on allowing Anthony Hurchalla to perform work at Respondent's theater facility and make him whole for any loss of earnings and other benefits suffered as a result of his ban from working at the facility in the manner set forth in the remedy section of this decision.

10 (b) Compensate Anthony Hurchalla for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating his backpay award to the appropriate calendar year(s).

15 (c) Within 14 days' of the date of the Board's Order, remove from its files all references to Anthony Hurchalla's discriminatory ban from working at Respondent's theater facility, and notify him in writing that this has been done and that the ban will not be used against him in any way.

20 (d) Preserve and, within 14 days of a request following the Board's Order, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

25 (e) Within 14 days after service by the Region, post at Respondent's theater facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in  
30 conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has  
35 gone out of business or closed its theater operation, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at Respondent's theater operation at any time since December 3, 2018.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

- 5 It is further ordered that the complaint allegations are dismissed insofar as they allege violations of the Act not specifically found.

Dated: Washington, D.C. March 2, 2021

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Mara-Louise Anzalone  
Administrative Law Judge

**APPENDIX**

**NOTICE TO EMPLOYEES  
Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefits and protection  
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT prohibit any subcontractor from employing Anthony Hurchalla to perform work at Sunset Cultural Center or otherwise discriminate against him for supporting the Union or because he joined and assisted the Union and engaged in concerted activities or to discourage you from engaging in these activities.

WE WILL NOT cause any subcontractor to remove Anthony Hurchalla while working on any event at Sunset Cultural Center or otherwise discriminate against him for supporting the Union or because he joined and assisted the Union and engaged in concerted activities or to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL remove from our files all references to Anthony Hurchalla's discriminatory removal and ban from working at Sunset Cultural Center and WE WILL notify him in writing that this has been done and that the ejection and/or ban will not be used against him in any way.

**SUNSET CULTURAL CENTER**

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_

By: \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

1301 Clay Street, Suite 300-N  
Oakland, CA 94612-5224  
Hours: 8:30 a.m. to 5:00 p.m.  
(510) 637-3300

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/32-CA-242555> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.